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April 4, 1985

The Honorable John I. Rogers, III
Member, House of Representatives
304-D Blatt Building
Columbia, South Carolina 29211

Dear Representative Rogers:

You have asked whether or not a proviso in Section 16 of the proposed Appropriations Bill for 1985-86 is constitutional. Such proviso reads as follows:

> Provided, Further, That notwithstanding the provisions of Section 9-1-1530 of the Code of Laws of 1976, the Budget and Control Board may continue the employment of the director of the Local Government Division during the Fiscal year 1985-86.

Your question appears to be controlled by the case of State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976), where our Supreme Court ruled that a virtually identical statute was unconstitutional.

Section 9-1-1530 is a general law providing in pertinent part:

> It shall be mandatory for any employee or teacher whether or not appointed and regardless of whether or not a member of the South Carolina Retirement System to retire no later than the end of the fiscal year in which he reaches his seventy-second birthday.
>
> This section shall not apply to any person holding an elective office.

REQUEST LETTER

In the McLeod case, the statute had been enacted creating a single exception to the foregoing provision. The language of that part of the statute was almost identical to the proviso contained in Section 16 and reads as follows:

> Notwithstanding the provisions of Section 61-103 [now § 9-1-1530] Code of Laws of South Carolina, 1962, the Judge of the Civil and Criminal Court of Darlington County who is presently serving may serve an additional term beginning July 1, 1975 and expiring June 30, 1978.

The Supreme Court there noted that "[e]xcept for this statute ... [the judge] was required by ... [§ 9-1-1530] of our Code to retire because of his age." 266 S.C. at 292.

Our Court referenced Article III, § 34 of the State Constitution and quoted therefrom as follows:

> "Special laws prohibited - The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes ... IX. In all other cases where a general law can be made applicable, no special law shall be enacted.

Based upon Article III, § 34, the Court thus reasoned:

> Patently, Act No. 34 was enacted for the benefit of the present judge of the court for the purpose of permitting him to avoid the mandatory retirement law. It is a special law where a general law could be made applicable and is therefore invalid.

266 S.C. at 279. Since McLeod, our Supreme Court has reemphasized this principle. Seaborn v. Hartsville Rescue Squad, 269 S.C. 386, 237 S.E.2d 496 (1977) [granting special privileges to two rescue squads unconstitutional]; State ex rel. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980) [providing persons elected to Court of Appeals an exemption from general law]; Duke

Power Co. v. Greenwood Co., Op. No. 22211 (January 15, 1985).

Therefore, based upon McLeod and subsequent decisions by our Supreme Court, it would appear that the referenced proviso is of doubtful constitutionality. 2/

We would note for your information that Article III, § 34(x) expressly provides "[t]hat nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws." Our court has usually upheld amendments to a general law, such as § 9-1-1530, to provide for certain exceptions. See, present § 9-1-1530 (exception for elective officials). See also, State v. Meares, 148 S.C. 118, 145 S.E. 695; State ex rel. Sellers v. Huntley, et al., 167 S.C. 476, 166 S.E. 637; Kalk v. Thornton, 269 S.C. 521, 238 S.E.2d 210 (1977). However, such provisions must be

> general in form. In operation [they must apply] to all areas falling within the class established and exclude[] none from its application who should be included.

269 S.C. at 526. And the classification itself must be rational and not arbitrary, one which is "based upon differences which

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1/ Because the McLeod decision is on all fours with your situation, it is unnecessary to address other constitutional questions such as Article III, § 17 (germaneness), see, Georgetown County Water and Sewer Dist. v. Jacobs, et al., Op. No. 22255 (March 11, 1985) and Equal Protection. See, State ex rel. McLeod v. Court of Probate of Colleton Co., supra at 293. It should be noted, however, that our Supreme Court recently stated that "[t]he effect of Article III, Section 34 ... is similar to that achieved by the guarantees of equal protection contained in the Constitutions of the United States and of South Carolina...." Duke Power Co., supra, Slip Op. at 11. That case provides an excellent summary of the law concerning Article III, § 34.

2/ Of course, every Act of the General Assembly is presumed constitutional. And such acts are valid until invalidated by the courts. This same presumption is afforded laws which violate Article III, § 34. Duke Power Co., supra.

Moreover, our Supreme Court has stated that there may be such unique circumstances that a general law is deemed inapplicable and the special law controlling. Shillito v. City of Spartanburg, 214 S.C. 11, 51 S.E.2d 95 (1948); Duke Power Co., supra. See also, 2 Sutherland, Statutory Construction, § 40.18; 82 C.J.S., Statutes, § 171. The Court, in McLeod did not mention this exception of uniqueness, however, and thus only a court could distinguish the situation in McLeod from the present legislation on this basis.

are either defined by the Constitution or are natural and intrinsic, and which suggest reasons that may rationally be held to justify the diversity of the legislation. State ex rel. Riley v. Martin, 274 S.C. at 117. Legislative findings with respect to the need for such a classification are accorded "great weight" by the courts. Dorant v. Robertson, 203 S.C. 424, 27 S.E.2d 714 (1943).

CONCLUSION

1. Because of our court's prior holding in State ex rel. McLeod v. Probate Court of Colleton Co., supra, the referenced proviso is most probably unconstitutional.

2. It is conceivable that a special provision contained in the general law, § 9-1-1530, would be upheld by a court, provided such classification is general in nature and is not arbitrary or discriminatory. Only a court could conclusively conclude that such criteria were met.

Sincerely,

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